

(3) *General major security-based swap participant analysis.* In connection with the definition of “major security-based swap participant,” the report generally should consider the tests used to identify the presence of a “substantial position” in a major category of security-based swaps, and the tests used to identify persons whose security-based swap positions create “substantial counterparty exposure,” including the potential use of alternative tests or thresholds;

(4) *Commercial risk hedging exclusion.* In connection with the definition of “major security-based swap participant,” the report generally should consider the definition of “hedging or mitigating commercial risk,” including whether that latter definition inappropriately permits certain positions to be excluded from the “substantial position” analysis, and whether the continued availability of the exclusion for such hedging positions should be conditioned on a person assessing and documenting the hedging effectiveness of those positions;

(5) *Highly leveraged financial entities.* In connection with the definition of “major security-based swap participant,” the report generally should consider the definition of “highly leveraged,” including whether alternative approaches should be used to identify highly leveraged financial entities;

(6) *Inter-affiliate exclusions.* In connection with the definitions of “security-based swap dealer” and “major security-based swap participant,” the report generally should consider the impact of rule provisions excluding inter-affiliate transactions from the relevant analyses, and should assess potential alternative approaches for such exclusions; and

(7) *Other topics.* Any other analysis of security-based swap data and information the Commission or the staff deem relevant to this rule.

(b) *Timing of report.* The report shall be completed no later than three years following the data collection initiation date, established pursuant to § 240.3a71-2(a)(2)(iii).

(c) *Public comment on the report.* Following completion of the report, the report shall be published in the FEDERAL REGISTER for public comment.

§ 240.3a71-3 Cross-border security-based swap dealing activity.

(a) *Definitions.* As used in this section, the following terms shall have the meanings indicated:

(1) *Conduit affiliate*—(i) *Definition.* *Conduit affiliate* means a person, other than a U.S. person, that:

(A) Is directly or indirectly majority-owned by one or more U.S. persons; and

(B) In the regular course of business enters into security-based swaps with one or more other non-U.S. persons, or with foreign branches of U.S. banks that are registered as security-based swap dealers, for the purpose of hedging or mitigating risks faced by, or otherwise taking positions on behalf of, one or more U.S. persons (other than U.S. persons that are registered as security-based swap dealers or major security-based swap participants) who are controlling, controlled by, or under common control with the person, and enters into offsetting security-based swaps or other arrangements with such U.S. persons to transfer risks and benefits of those security-based swaps.

(ii) *Majority-ownership standard.* The majority-ownership standard in paragraph (a)(1)(i)(A) of this section is satisfied if one or more persons described in § 240.3a71-3(a)(4)(i)(B) directly or indirectly own a majority interest in the non-U.S. person, where “majority interest” is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.

(2) *Foreign branch* means any branch of a U.S. bank if:

(i) The branch is located outside the United States;

(ii) The branch operates for valid business reasons; and

(iii) The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.

(3) *Transaction conducted through a foreign branch*—(i) *Definition.* *Transaction conducted through a foreign branch* means a security-based swap transaction that is arranged, negotiated, and executed by a U.S. person

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through a foreign branch of such U.S. person if:

(A) The foreign branch is the counterparty to such security-based swap transaction; and

(B) The security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States.

(ii) *Representations.* A person shall not be required to consider its counterparty's activity in connection with paragraph (a)(3)(i)(B) of this section in determining whether a security-based swap transaction is a transaction conducted through a foreign branch if such person receives a representation from its counterparty that the security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States, unless such person knows or has reason to know that the representation is not accurate; for the purposes of this final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.

(4) *U.S. person.* (i) Except as provided in paragraph (a)(4)(iii) of this section, *U.S. person* means any person that is:

(A) A natural person resident in the United States;

(B) A partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States;

(C) An account (whether discretionary or non-discretionary) of a U.S. person; or

(D) An estate of a decedent who was a resident of the United States at the time of death.

(ii) For purposes of this section, *principal place of business* means the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person. With respect to an externally managed investment vehicle, this location is the office from which the manager of the vehicle primarily directs, controls, and

coordinates the investment activities of the vehicle.

(iii) The term *U.S. person* does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.

(iv) A person shall not be required to consider its counterparty to a security-based swap to be a U.S. person if such person receives a representation from the counterparty that the counterparty does not satisfy the criteria set forth in paragraph (a)(4)(i) of this section, unless such person knows or has reason to know that the representation is not accurate; for the purposes of this final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.

(5) *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(b) *Application of de minimis exception to cross-border dealing activity.* For purposes of calculating the amount of security-based swap positions connected with dealing activity under § 240.3a71-2(a)(1), except as provided in § 240.3a71-5, a person shall include the following security-based swap transactions:

(1)(i) If such person is a U.S. person, all security-based swap transactions connected with the dealing activity in which such person engages, including transactions conducted through a foreign branch;

(ii) If such person is a conduit affiliate, all security-based swap transactions connected with the dealing activity in which such person engages; and

(iii) If such person is a non-U.S. person other than a conduit affiliate, all of the following types of transactions:

(A) Security-based swap transactions connected with the dealing activity in which such person engages that are entered into with a U.S. person; provided,

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however, that this paragraph (b)(1)(iii)(A) shall not apply to:

(1) Transactions with a U.S. person counterparty that constitute transactions conducted through a foreign branch of the counterparty, when the counterparty is a registered security-based swap dealer; and

(2) Transactions with a U.S. person counterparty that constitute transactions conducted through a foreign branch of the counterparty, when the transaction is entered into prior to 60 days following the earliest date on which the registration of security-based swap dealers is first required pursuant to the applicable final rules and regulations; and

(B) Security-based swap transactions connected with the dealing activity in which such person engages for which the counterparty to the security-based swap has rights of recourse against a U.S. person that is controlling, controlled by, or under common control with the non-U.S. person; for these purposes a counterparty has rights of recourse against the U.S. person if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. person in connection with the security-based swap; and

(2) If such person engages in transactions described in paragraph (b)(1) of this section, except as provided in § 240.3a71-4, all of the following types of security-based swap transactions:

(i) Security-based swap transactions connected with the dealing activity in which any U.S. person controlling, controlled by, or under common control with such person engages, including transactions conducted through a foreign branch;

(ii) Security-based swap transactions connected with the dealing activity in which any conduit affiliate controlling, controlled by, or under common control with such person engages; and

(iii) Security-based swap transactions connected with the dealing activity of any non-U.S. person, other than a conduit affiliate, that is controlling, controlled by, or under common control with such person, that are

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described in paragraph (b)(1)(iii) of this section.

[79 FR 47370, Aug. 12, 2014]

EFFECTIVE DATE NOTE: At 81 FR 8637, Feb. 19, 2016, § 240.3a71-3 was amended by adding paragraph (b)(1)(iii)(C), effective Apr. 19, 2016. For the convenience of the user, the added text is set forth as follows:

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(C) Unless such person is a person described in paragraph (a)(4)(iii) of this section, security-based swap transactions connected with such person's security-based swap dealing activity that are arranged, negotiated, or executed by personnel of such non-U.S. person located in a U.S. branch or office, or by personnel of an agent of such non-U.S. person located in a U.S. branch or office; and

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§ 240.3a71-4 Exception from aggregation for affiliated groups with registered security-based swap dealers.

Notwithstanding §§ 240.3a71-2(a)(1) and 240.3a71-3(b)(2), a person shall not include the security-based swap transactions of another person (an "affiliate") controlling, controlled by, or under common control with such person where such affiliate either is:

(a) Registered with the Commission as a security-based swap dealer; or

(b) Deemed not to be a security-based swap dealer pursuant to § 240.3a71-2(b).

[79 FR 47370, Aug. 12, 2014]

§ 240.3a71-5 Exception for cleared transactions executed on a swap execution facility.

(a) For purposes of § 240.3a71-3(b)(1), a non-U.S. person, other than a conduit affiliate, shall not include its security-based swap transactions that are entered into anonymously on an execution facility or national securities exchange and are cleared through a clearing agency; and

(b) For purposes of § 240.3a71-3(b)(2), a person shall not include security-based swap transactions of an affiliated non-